Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1790

CLIVE J. DAVIS,

Petitioner,

v.

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

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v.

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

Clive J. Davis prays that a writ of certiorari issue to review the judgment of the New York State Supreme Court, Appellate Division, Second Department, entered in this case on December 12, 1977.

Opinions Below

The order of the Court of Appeals of the State of New York denying petitioner's motion for leave to appeal to that Court (App. A, *infra*) is not reported. The decision of the New York State Supreme Court, Appellate Division, Second Judicial Department (App. B, *infra*), is reported at —— A.D.2d ——, 402 N.Y.S.2d 335 (1978), and the order (App. C, *infra*) based upon that decision is unreported.

Jurisdiction

The judgment of the Appellate Division of the Supreme Court of the State of New York was entered on December 12, 1977. The order of the Court of Appeals denying leave to appeal to that Court was entered on March 23, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented

1. Whether the retroactive application of an interpretation of § 90(4) of the Judiciary Law of New York which mandates automatic disbarment of an attorney who is convicted of a federal felony which is cognizable in New York State only as a misdemeanor constitutes a violation of Article 1, § 10 of the Constitution of the United States.

2. Whether a court order summarily disbarring an attorney and retroactively vacating a disciplinary hearing previously held pursuant to then existing law constitutes a violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

Constitutional and Statutory Provisions Involved

Article 1, § 10, Clause 1 of the United States Constitution provides in pertinent part as follows:

> "No State shall . . . pass any . . . ex post facto Law, . . ."

Amendment Fourteen, Section 1, of the United States Constitution provides in pertinent part as follows:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

Section 90(4) of the Judiciary Law of New York State provides:

> "Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.
>
> Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the Supreme Court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys."

Statement

Petitioner was duly admitted to the Bar of the State of New York in 1957. On September 23, 1976, judgment of conviction was entered against petitioner after his plea of guilty in the United States District Court for the Southern District of New York to a violation of 26 U.S.C. § 7201. Petitioner's plea concerned the omission of $8,800 of income from his 1972 tax return, on which he did report income of $335,000 and paid substantial taxes thereon. The $8,800 of omitted income was comprised entirely of travel expenses of petitioner and his family paid for by petitioner's employer during trips which were partly for business and partly for vacation. The sentencing judge suspended imposition of sentence, and placed petitioner on probation for one day.

Under New York law, the crime of tax evasion is only a misdemeanor. Tax Law, § 376(5). At the time petitioner entered his plea of guilty on May 24, 1976, the law of New York was that an attorney convicted in federal court of a felony which was cognizable in New York only as a misdemeanor, was not subject to the automatic disbarment provision of § 90(4) of the Judiciary of New York, but,

rather, to whatever punishment the Appellate Division of the Supreme Court of the State of New York saw fit to impose, including censure, suspension or disbarment. Thus, pursuant to applicable law, a hearing was conducted by a referee who was appointed by the Appellate Division of the Supreme Court of the State of New York. After the hearing, the referee reported to the Appellate Division his findings, which included substantial findings of mitigating circumstances. On September 28, 1977, Respondent Grievance Committee moved in the Appellate Division for an order confirming the referee's findings of professional misconduct and imposing such discipline as the Court deemed just and proper. At no time had the Appellate Division ever imposed disbarment as punishment for a violation of 26 U.S.C. § 7201, the offense to which petitioner pleaded guilty. Rather, it consistently imposed censures or suspensions as the appropriate sanction.

On October 13, 1977, while the Appellate Division was considering the appropriate discretionary sanction to impose upon petitioner, the Court of Appeals of the State of New York decided *Chu* v. *Association of the Bar of the City of New York*, 42 N.Y.2d 490, 369 N.E.2d 1, 398 N.Y.S. 2d 1001 (1977). In that case, respondent Chu had been convicted of a federal felony which was substantially similar to a New York felony. On the basis of certain language in the majority opinion in *Chu*, respondent Grievance Committee in the instant case moved before the Appellate Division: to nullify the prior hearing conducted at that Court's direction, to nullify the referee's findings, to withdraw its motion to confirm the referee's report, and to impose automatic disbarment upon petitioner. Petitioner opposed the motion in all respects, and raised in its opposing brief the constitutional issues presented here. Petitioner argued: (1) That the Appellate Division, even if it were to construe *Chu* as mandating automatic disbarment on the facts of this case, should not apply the holding retroactively because of Article 1, § 10 of the United States

Constitution; and (2) that retroactive application of the holding on the facts of the instant case would be unfair to petitioner. Prior to respondent's motion to nullify the prior proceedings and to summarily disbar petitioner, no constitutional issues were involved.

On December 12, 1977, the Appellate Division granted respondent's motion in all respects, and automatically disbarred petitioner on the basis of the holding in *Chu*. Petitioner moved before the Court of Appeals for leave to appeal to that Court the holding of the Appellate Division. Once again, petitioner raised the above-discussed constitutional issue in his supporting brief. On March 23, 1978, the Court of Appeals denied, without opinion, petitioner's motion for leave to appeal.

Reasons For Granting The Writ

1. Retroactive Application of the Order of the Supreme Court, Appellate Division of the State of New York, In The Instant Case, Constitutes A Violation of Article 1, Section 10 Of The United States Constitution.

Until the decision by the Court of Appeals in *Chu*, and its broad interpretation by the Appellate Division in the instant case, the latter court has consistently imposed censures or suspensions as appropriate sanctions for transgression of the federal tax statute involved here (26 U.S.C. § 7201. *In re Barry B. Silver*, 57 A.D.2d 215, 394 N.Y.S.2d 68 (2d Dept. 1977); *In re Jerome J. Hersh*, 56 A.D.2d 405, 392 N.Y.S.2d 691 (2d Dept. 1977); *Adel* v. *Bar Association of Erie County*, 41 A.D.2d 509, 344 N.Y.S.2d 110 (4th Dept. 1973); *Curtis* v. *Monroe County Bar Association*, 39 A.D.2d 86, 332 N.Y.S.2d 438 (4th Dept. 1972); *In re Abramson*, 37 A.D.2d 301, 324 N.Y.S.2d 891 (2nd Dept. 1971); *Joyce* v. *New York Bar Association*, 37 A.D.2d 289, 324 N.Y.S.2d 638 (3rd Dept. 1971); *Neville* v. *Monroe County Bar Asso-*

ciation, 31 A.D.2d 266, 297 N.Y.S.2d 271 (4th Dept. 1969); *In re Rotwein*, 20 A.D.2d 428, 247 N.Y.S.2d 775 (1st Dept. 1964); *In re Nunan*, 12 A.D.2d 365, 211 N.Y.S. 2d 633 (1st Dept. 1962); *In re Spira*, 14 A.D.2d 19, 217 N.Y.S.2d 701 (3rd Dept. 1961); *In re Levine*, 12 A.D.2d 72, 208 N.Y.S.2d 119 (1st Dept. 1960); *Application of the Bar Association of Nassau County*, 4 A.D.2d 673, 163 N.Y.S. 2d 752 (2nd Dept. 1957); *In re Crosby*, 281 App. Div. 801, 119 N.Y.S.2d 478 (4th Dept. 1953). The automatic disbarment provision of the Judiciary Law § 90(4) has never been applied to convictions under 26 U.S.C. § 7201, and petitioner pleaded guilty in reliance on that substantial precedent.

By interpreting the holding in *Chu* as mandating automatic disbarment on the facts of this case, the Appellate Division has significantly increased the punishment for this particular transgression. This Court said in *Beazell* v. *Ohio*, 269 U.S. 167, 169 (1925):

> "It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; *which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed is prohibited as ex post facto.*" (emphasis supplied).

See also, *Dobbert* v. *Florida*, 432 U.S. 282, 97 S.Ct. 2290 (1977); 16 *Am.Jur.2d, Constitutional Law* § 402.

In the instant case, not only has the punishment been made more burdensome after the act was committed, but, in addition, petitioner has been deprived of a defense available according to law at the time the act was committed—viz. the opportunity to present mitigating factors at a hearing, and the right to have his punishment selected by

the Court from among a range of possibilities, including merely censure or suspension. In the instant case, petitioner had already had his hearing as ordered by the Court, and was awaiting the discretionary judgment of the Court when *Chu* was decided.

While petitioner is not charged with a crime in the disciplinary proceeding in question, the fact is that disbarment for life is, in effect, a penalty or punishment. As the Court of Appeals noted in *In re Donegan*, 282 N.Y. 285, 291, 26 N.E.2d 260 (1940)[1]:

> "Although disbarment is not strictly a punishment for crime, but only the withdrawal of a privilege (*Matter of Rouss*, 221 N.Y. 81, 91, 116 N.E. 782), it cannot be denied that *the requirement of automatic and irrevocable disbarment for life provided by the Judiciary Law, is in effect a consequence most severe, and partakes of the nature of punishment.*" (Emphasis supplied.)

Regardless of whether the holding in *Chu*, and its interpretation by the Appellate Division in the instant case are sound, their impact should not be visited upon petitioner whose plea of guilty, and whose disciplinary hearing, had occurred before *Chu* was decided.

2. Retroactive Application of the Order of the Supreme Court, Appellate Division of New York State in The Instant Case Constitutes A Violation of Amendment Fourteen of the United States Constitution.

The essence of due process is the prevention of conduct which "shock[s] the sense of fair play." *Galvan* v. *Press*, 347 U.S. 522, 530 (1954). In the instant case, petitioner was

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[1] While the precise holding in *In re Donegan* was effectively overruled by the decision in *Chu*, the observation quoted in the text above was not in any way diminished.

accorded a disciplinary hearing according to law, and the findings of the referee who conducted the hearing were transmitted to the Supreme Court, Appellate Division of New York State for appropriate action. The referee found the petitioner's offense to have been of a *de minimis* nature, and he also found the most compelling mitigating circumstances. At the time, respondent made a motion merely requesting that Court to impose such discipline as it "may deem just and proper." Only after the decision of the Court of Appeals of New York State in *Chu* did respondent move, successfully, for an order disregarding and rendering a nullity the disciplinary hearing which had previously been held at the direction of the Appellate Division, and summarily disbarring petitioner.

Based upon substantial precedent (See Point I, *supra*), petitioner had every reason to believe after his hearing that the worst sanction the Appellate Division would impose on him would be suspension from practice for a limited period. Instead, the hearing and the referee's findings were retroactively rendered a nullity, and petitioner was subjected to a draconian punishment which had never been foreseen, and which he was accorded no opportunity to defend against. Regardless of whether *prospective* application of the summary disbarment interpretation of *Chu* is consistent with the Constitution of the United States, clearly, the retroactive application of it to petitioner after he had already been subjected to a disciplinary hearing, violates the "sense of fair play" required by the due process clause of the Constitution.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

June 14, 1978

Respectfully submitted,

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APPENDIX A

Order of the Court of Appeals of the State of New York (unreported).

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-third day of March A. D. 1978

PRESENT, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

2 Mo. No. 164

In the Matter of

Clive J. Davis, an Attorney.
Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts,

Respondent,

Clive J. Davis,

Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant and papers having been subr itted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

APPENDIX B

Decision of the New York Supreme Court, Appellate Division, Second Judicial Department, —— A.D. 2d ——, 402 N.Y.S.2d 335.

ms

No. 5926 — In the Matter of Clive J. Davis, an attorney and counselor-at-law. Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts, petitioner; Clive J. Davis, respondent.

Motion by petitioner (1) to withdraw the motion to confirm the Referee's report, on the ground that the respondent has been automatically disbarred by reason of his conviction and sentence for a felony in the United States District Court for the Southern District of New York, on September 23, 1976, (2) to vacate this court's order dated January 11, 1977 which authorized the institution of the proceeding against respondent and (3) to strike respondent's name from the rolls of attorneys by reason of said conviction.

Motion granted. The motion to confirm the Referee's report is deemed withdrawn and the order authorizing the proceeding is deemed recalled and vacated. The respondent is disbarred. The clerk of this court is directed to strike the respondent's name from the roll of attorneys and counselors-at-law, forthwith (*Matter of Chu*, 42 N.Y.2d 490, 398 N.Y.S.2d 1001, 369 N.E.2d 1).

GULOTTA, P.J., HOPKINS, LATHAM, COHALAN and DAMIANI, JJ., concur.

December 12, 1977 — IN RE DAVIS, CLIVE J., ATTORNEY — No. 5926

APPENDIX C

Order of the New York Supreme Court, Appellate Division, Second Judicial Department, (unreported).

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department held in Kings County on December 12, 1977.

HON. FRANK A. GULOTTA, Presiding Justice,
HON. JAMES D. HOPKINS,
HON. HENRY J. LATHAM,
HON. JOHN P. COHALAN, JR.,
HON. VINCENT D. DAMIANI.
Associate Justices

Order

In the Matter of Clive J. Davis, an attorney and counselor-at-law.

Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts,

Petitioner;

Clive J. Davis,

Respondent.

This court, by an order dated January 11, 1977, having directed the above named petitioner to institute and prosecute a disciplinary proceeding against the above named respondent Clive J. Davis, an attorney and counselor-at-law (who was admitted to the Bar of the State of New York by this court on October 16, 1957); thereafter, the said proceeding having come on before this court by a notice of petition and petition, dated and verified April 7,

1977, and the said respondent having filed an answer thereto; thereafter, by a further order of this court, dated June 1, 1977, the issues raised by the said petition and the answer were referred to Hon. AARON E. KOOTA, a Retired Justice of the Supreme Court, to hear and report, with his findings upon each of the issues; thereafter, the said Justice having held a hearing and having filed his report with this Court on September 23, 1977, together with a transcript of the hearing and the exhibits; thereafter, the petitioner having moved, by a notice of motion dated September 28, 1977, to confirm the said report, with an affidavit by Gary L. Casella, and the respondent, by Robert G. Morvillo, Esq., having submitted an affidavit with a memorandum of law with reference thereto; thereafter, the petitioner having moved, by a notice of motion dated October 27, 1977, (1) to withdraw the motion to confirm the Referee's report, on the ground that the respondent has been automatically disbarred by reason of his conviction and sentence for a felony in the United States District Court for the Southern District of New York, on September 23, 1976, (2) to vacate this court's said order dated January 11, 1977 which authorized the institution of the proceeding against the respondent and (3) to strike respondent's name from the roll of attorneys by reason of the said conviction;

Now, on reading and filing the said notice of motion, dated October 27, 1977, the affidavit of Gary L. Casella and the petitioner's memorandum of law in support of said motion and the respondent's memorandum of law in opposition thereto; and Gary L. Casella, Esq., having appeared of counsel for the petitioner and Thomas Fitzpatrick, Esq., having appeared of counsel for the respondent, due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the said motion is hereby granted, and it is further

ORDERED that the motion to confirm the Referee's report is hereby deemed withdrawn, and it is further

ORDERED that the said order dated January 11, 1977 is hereby deemed recalled and vacated, and it is further

ORDERED that, effective December 12, 1977, the respondent CLIVE J. DAVIS, admitted as CLIVE JAY DAVIS, is hereby disbarred, and his name is directed to be struck from the roll of attorneys and counselors-at-law (*Matter of Chu*, 42 NY2d 490), and it is further

ORDERED that, pursuant to Statute (Judiciary Law, § 90), the said CLIVE J. DAVIS, admitted as CLIVE JAY DAVIS, is hereby commanded to desist and refrain: (1) from the practice of the law in any form, either as principal, or as agent, clerk or employee of another: (2) from appearing as an attorney or counselor-at-law before any judge, justice, board, commission or other public authority; (3) from giving another an opinion as to the law or its application or any advice in relation thereto; and (4) from holding himself out in any way as an attorney and counselor-at-law, and it is further

ORDERED and DIRECTED that the said CLIVE JAY DAVIS shall comply with this court's rules governing the conduct of disbarred, suspended or resigned attorney—a copy of such rules being annexed hereto and made a part hereof.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division